***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-1584

*To be argued by*
LEE S RICHARDS

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1584**

B P/S

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

CLARA NEMES,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA

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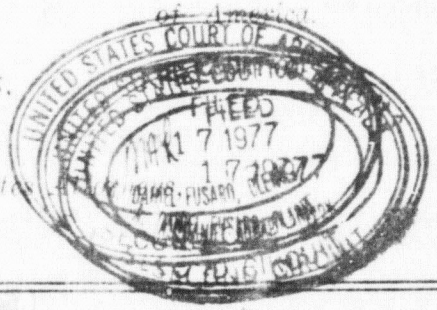

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## FOR THE SECOND CIRCUIT

## Docket No. 76-1584

UNITED STATES OF AMERICA,

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## BRIEF FOR THE UNITED STATES OF AMERICA

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### Preliminary Statement

Clara Nemes appeals from a judgment of conviction entered on October 15, 1976, in the United States District Court for the Southern District of New York after a 12-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 76 Cr. 534 charged Nemes with conspiring with co-defendants Manlio S. Severino, his son Dr. Lawrence Severino, and other unindicted co-conspirators to defraud the United States by submitting and causing the submission of false cost reports for Medicare and Medicaid payments to a nursing home in violation of Title 18, United States Code, Section 371.*

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* Manlio Severino was also charged with eleven counts of making false statements and filing false claims in violation of Title 18 United States Code §§ 287 and 1001. On December 3, 1976, Manlio Severino pleaded to a superseding Information charging him with conspiracy and filing false claims against the United States. On January 7, 1977, he was sentenced to five years imprisonment with all but five months suspended followed by unsupervised probation for one month; and a fine of $2,500. Severino is presently serving his sentence. Lawrence Severino was charged with two counts of false statements in violation of Title 18 United States Code §§ 1001. An order or *nolle prosequi* has been filed as to him.

Trial of Nemes and Manlio Severino* began on September 28, 1976. On October 13, 1976, a mistrial was declared as to Manlio Severino after he suffered a stroke. On October 15, 1976, after 52 minutes of deliberation, the jury found Nemes guilty as charged.

On December 3, 1976, Judge Wyatt sentenced Nemes to two years imprisonment with all but two months suspended followed by two years probation. Nemes remains free on a $10,000 personal recognizance bond pending this appeal.

## Statement of Facts

### The Government's Case

#### A. Synopsis

Over a period of three years, Manlio Severino, assisted by his accountant, Percy Karlin, inflated various Medicare and Medicaid expenses on the cost reports for the Sprain Brook Manor Nursing Home. Severino's bookkeeper and office manager, Clara Nemes, kept the books of the nursing home and of Limpio Service, a cleaning company formed by Severino for the express purpose of further inflating his cost reports. The ownership and control of Limpio by Severino was not disclosed on the cost reports as required, since doing so would cause a portion of the contract price to be disallowed.

In January 1973, in preparation for the sale of the nursing home, Severino incorporated Limpio and entered into a cleaning contract with it. The sale agreement then required that this cleaning contract be assumed by the new owners. To demonstrate the absolute control exercised over Limpio by Severino and Nemes it was shown at trial that, by use of another fictitious company—Tarpetto Cleaners—all of the money paid by the new owners of the nursing home was channeled out of Limpio, much for Nemes' own purposes.

After the investigation of Sprain Brook's cost reports began, Severino and Nemes attempted to cover their

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* Dr. Lawrence Severino's trial had been previously severed.

trail by replacing the money taken out of Limpio and insisting that the company belonged to Olgo Vera, an uneducated cleaning woman.

## B. Severino and Karlin Pad Cost Reports

Sprain Brook Manor Nursing Home, located in Scarsdale, New York,* was managed by Manlio S. Severino for its three owners: his wife Annette, his son (and co-defendant) Dr. Lawrence Severino and his daughter Joan Severino Paresti. For each of the years 1971, 1972 and 1973, Medicare reports (Forms SSA1750) certified by Manlio Severino were submitted to Travelers Insurance Company, the fiscal intermediary for the Social Security Administration (GX 5, 10, 12). For the years 1971 and 1972 Medicaid cost reports (HE-2P), also certified by Severino, were submitted to the New York State Department of Health (GX 17, 18).** The evidence at trial demonstrated that expenses shown on both the federal and state cost reports for the three years were falsely inflated in the following respects:

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* During the period of 1971 to 1974 Sprain Brook Manor Nursing Home was certified to render treatment under both the Medicare and Medicaid programs (Tr. 81 GX 1-4A). References to "Tr." are to the trial transcript; "GX" denotes Government exhibits and "DX" denotes defense exhibits.

** The Medicare and Medicaid programs were implemented by Titles 18 and 19 of the Social Security Act (Tr. 70-75). Nursing homes servicing patients eligible for benefits under either program were paid a per-diem rate which, in the case of Medicare, is set by a fiscal intermediary for the Social Security Administration—in this case Travelers Insurance Company (Tr. 96-7); and in the case of Medicaid, by the New York State Department of Health. The per-diem rate is based on the actual costs of operating the nursing home (Tr. 99-101, 330-1) which are determined from cost reports "SSA 1750" for Medicare and "HE-2P" for Medicaid. The more expense shown on the cost report the higher the rate. The rate is payable for Medicare patients by Travelers under a contractual arrangement with the federal Government, which pays 100% of Medicare costs. The Department of Social Services for the county in which the pa-

[Footnote continued on following page]

(1) The sum of $22,666.67 was claimed as land rent when the land was not required for the operation of the nursing home. (Tr. 529, 578, 599, 787-9, GX 22, 25, 25A).

(2) Over $7700 was charged to either operating expense or capital for carpeting; installation of an automatic garage door opener at Severino's personal residence; and furniture for Severino's condominium in Florida. (Tr. 502-17; 806-7; 814, 820, GX 26-47A).

(3) Over $3800 paid to Coca-Cola Company was claimed as dietary expense while the income from the sale of the beverages, which was required to be offset against the expense, was pocketed by Severino and not reported. (Tr. 721, 832).

(4) The sum of $96,375 was claimed as salary expense for Dr. Lawrence Severino, Annettee Severino and Joan Severino Paresi when they did not perform any services. (Tr. 368-9; 455-463, 705-7, 1347, 1357-59).

(5) The sum of $29,515 in interest on a construction loan was claimed as expense in one year instead of, being capitalized and amortized over the period of the permanent mortgage (Tr. 783-5) as required by regulations.

(6) Over $3900 in penalties for delinquent mortgage payments was claimed as interest expense. Penalties are not included in interest expense. (Tr. 834-41).

(7) The sum of $190,629 claimed as the cost of a fictitious cleaning contract with Limpio Cleaning Serv-

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tient resides pays for Medicaid patients. The county Department of Social Service renders monthly reports to the New York State Department of Social Services which, in turn, reports quarterly to the Department of Health, Education and Welfare the amount expended for federally-eligible Medicaid treatment. Money is then transferred to the state based on the quarterly reports. (Tr. 434-38). The county is reimbursed 75 percent of its costs—25 percent by the State and 50 percent by the federal Government.

ice, (later incorporated as Limpio Service Incorporated), (a related organization), was charged to houskeeping expense. During 1973 approximately $12,000 of Limpio's expense was for fictitious payroll. (Tr. 715, 720-1, 1366-7).

Percy Karlin, an unindicted co-conspirator, began working for Severino in 1967 when he became the accountant for the Kent Nursing home, another Severino home. Later he serviced Kentnur Development Company, the Sprain Brook Holding Company, the Sprain Brook Manor Nursing Home, and Limpio Services Inc., all of which were owned or controlled by the Severino family. (Tr. 764).

Nemes was employed by Severino as his full-charge or head bookeeper (Tr. 295, 670, 689-90, 770-1, 1028), having complete charge of all of the books of the Home. Tr. 1062). Karlin rated her as an excellent accountant who rarely sought advice from him in classification problems (Tr. 830) although as the outside accountant he supervised her work. (Tr. 1029).

Karlin assisted Severino in preparing the cost reports for both Medicare and Medicaid for the nursing homes. (Tr. 778-80).

In the spring of 1972, while they were preparing the 1971 cost reports, Severino and Karlin discussed means by which Sprain Brook's expenses could be increased, thereby increasing the loss on Sprain Brook's books and decreasing the profit at Kent. (Tr. 857). Severino discussed inflating the interest expense (Tr. 783-5); claiming Coca-Cola expense while not offsetting income (Tr. 833-4); and claiming non-deductible mortgage late-charges as interest (Tr. 837). However, Karlin was unaware of the true nature of the charges for the rent, the carpeting,

the garage door opener and the furniture, relying on entries and checks made by Nemes. (Tr. 809, 813-18, 822, 1145, 1273-4).*

## C. Limpio is Born—Nemes Helps Nurse it Into Existence

In early 1972, explaining that the cleaning expense was too low, Severino told Karlin that he was setting up Limpio Cleaning Service. (Tr. 1165). Severino instructed Karlin to pick out Sprain Brook's housekeeping payroll expense and deduct it from a contract for $62,000, which he said existed between Sprain Brook and Limpio.** (Tr. 860-3). Deducting the actual payroll expense from the contract price furnished by Severino resulted in a $12,-064.92 "profit" to Limpio which was included in the 1971 cost report. (Tr. 866). Of the $12,064 allegedly payable for 1971, two checks were issued in December of 1972 by Sprain Brook to Limpio—one for $5000, and one for $7064. The latter was never cashed. (GX 72).***

On December 14, 1972, Manlio Severino, using a $5000 check, opened an account with the Hudson Valley National Bank for Limpio Services Corp. in the name of "Salvatore Severino." **** (Tr. 876-80, GX 82, 82A, 84, 117). Salvatore Severino and Olga Vera were listed as

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* Karlin also identified several spurious entries in the books, one by Severino and two by Nemes, which were apparently designed as a defense to throw the blame on him for showing that he did not post several purchases properly. (Tr. 810, 825; 1065, 1284-5).

** Karlin never saw the contract (Tr. 867, 1166; GX 19). When asked if one existed Severino replied "Don't worry—when the contract is necessary and when it is necessary to produce a contract, I'll have one." (Tr. 868) Olga Vera, the purported president of Limpio, never saw a contract until sometime after December 1973 when ner daughter translated it for her. (Tr. 1451-2, 1455, GX 19).

*** The entries on the checks were made by Nemes. (Tr. 879, 1491).

**** It was stipulated that Manlio Severino was the author of all of the Salvatore Severino signatures. (GX 117).

signatories.* (GX 82, 82A). On December 18, 1972, a $4500 check was drawn on the Limpio account by "Salvatore Severino" was made payable to Thomaston Spruce Corporation (GX 85).** On December 21, 1972 a check for $4000 was drawn by Thomaston Spruce by Manlio Severino to the Kent Nursing Home. (GX 88).***

In early 1973 Severino furnished Karlin a contract price of $75,000 for cleaning (Tr. 868), which after payroll expenses and expenses for cleaning supplies yielded a "profit" for Limpio of $27,268.46, which was added to the 1972 cost report. (Tr. 871-3).

For the 1973 cost report, which covered a period of 10 months prior to the sale of the nursing home, a contract price of $90,000 was shown by Severino, which yielded $45,300 in "profit" after actual expense. (Tr. 953).

On January 3, 1973, a Certificate of Incorporation signed by Olga Vera was filed for Limpio Service, Inc.**** Severino told Karlin that he had formed Limpio and that Olga Vera ***** was going to run the operation for him in return for 10 percent of the business. (Tr. 887). Limpio had no assets or capital, as it was run on a day to day basis. (Tr. 1127). All of Limpio's employees were obtained from the Sprain Brook and Kent payrolls. (Tr. 709). Severino opened a bank account for Limpio at the Chase Manhattan Bank in January of 1973 and named Nemes as the contact person. (Tr. 899, 1413-15). Limpio's books, including the check book, were kept by Nemes, who

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* Olga Vera's signature on each of the signature cards was a forgery. (Tr. 1504).

** Severino owned Thomaston Spruce. (Tr. 949; GX 86, 87).

*** Severino authored both the Limpio and Thomaston Spruce checks. (GX 117).

**** The certificate which was prepared by Severino was purportedly executed on February 23, 1972, but notarized on December 26, 1972. (GX 97).

***** According to her daughter Haydee Norbrega, Olga Vera cannot read or write and speaks little English. (Tr. 1450). This fact was conceded by Severino's attorney at trial. (Tr. 943).

also did the accounting. (Tr. 900, 1158, 1280). Any checks issued by Sprain Brook to Limpio were usually just enough to cover Limpio's payroll. (Tr. 903, 958). At Severino's request, Karlin became Limpio's accountant and secretary so he could sign checks in case Olga Vera was not around. (Tr. 888, 1279-80). However, after two months Karlins resigned because of a conflict of interest, since he was also Limpio's outside accountant. (Tr. 898). Karlin, at Severino's direction, prepared a Form 2553 (Election by Small Business Corporation) (GX 75) which represented that as of January 3, 1973 Limpio had no relationship with any pre-existing organizations. The form also listed Severino's children and grandchildren as owning 90 shares and Olga Vera owning 10 shares of stock. (GX 894.5). On September 11, 1974, Karlin filed and amended form 2553, prepared by Severino, in which the children were dropped and additional grandchildren were added. However, Olga Vera's share remained at 10 percent. (Tr. 896, 901, GX 76).*

## D. The Fictitious Payroll—Nemes Helps Severino Collect

Early in 1973 Severino told Karlin that he had been taking an average of $500 a week in cash out of Limpio and sought advice as to how it could be covered up. Karlin suggested putting fictitious employees on the payroll to cover that amount and advised fabricating social security numbers in order to cover up the deception on the Limpio tax returns.** Severino personally kept a third payroll book in addition to the ones for Limpio

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* Karlin also prepared and filed income tax returns for Limpio, which were first reviewed by Lawrence Severino and his father. (Tr. 1305). Those returns listed the grandchildren as shareholders. (GX 102-1025).

** Robert Pogge of the Social Security Administration testified that in eight instances social security numbers furnished for employees on the employees withholding statement filed by Limpio (Form 941, 941A) (GX 77-80) were rejected by the computer in Baltimore because they did not match the names with which they were associated (Tr. 1482-8).

"employees" working at Sprain Brook and Kent, so that he could keep track of his fictitious employees. (Tr. 906-11, 919-20).

Majorie Murphy, a former employee of Sprain Brook, worked for Nemes in the business office as a bookkeeper. (Tr. 690). From Jauuary of 1973 to the beginning of 1974, as part of her duties for Sprain Brook, and at the direction of either Severino or Nemes (Tr. 708), she prepared Limpio's payroll. (Tr. 708). A check would be prepared by either Severino, Nemes or Karlin and cashed by Murphy, Rosemary McNamara, another clerk or Rosemary Weis, the home's administrator. (Tr. 661, 709, 1364). The money was placed in payroll envelopes and given to Olga Vera, the head of the Sprain Brook housekeeping staff, for distribution (Tr. 710). On every occasion, the check would be for $200. to $250. more than required to stuff the envelopes. This amount would be obtained in large denomination bills and given to Nemes or Severino (Tr. 715, 720-1, 1366-7). In this manner between $24,000 and $26,000 was siphoned out of Limpio by Severino and Nemes. (Tr. 963).

## E. Fresh Money Comes Into Limpio—Tarpetto is Born

In November 1973, Severino sold Sprain Brook for $330,000. to a group led by Henry Book.* Book was required by Severino to take a three-year cleaning contract with Limpio for $85,000 per year as part of the sale. (Tr. 1426-7).** Payments on the contract were made to Limpio in care of Kent Nursing Home. (Tr. 1428).

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* The sales contract, executed on December 7, 1972, required Book to assume contracts in existence as of December 1972. (Tr. 1426).

** The Limpio contract was dated December 6, 1972. (GX 19). Limpio was not incorporated until January 3, 1973. (GX 97).

In 1974, because of the influx of money being paid by Book to Limpio, Severino asked Karlin how he could reduce Limpio's profit in order to avoid tax. Karlin suggested they increase Limpio's expenses. (Tr. 925). A few weeks later, Severino told Karlin that Tarpetto Cleaning would be doing work for Limpio. The sum of $14,300 was transferred from Limpio to Tarpetto in five checks (GX 80A, 117). Although each was signed by Olga Vera the checks were written by either Severino or Nemes. (Tr. 935).

Bank records for Tarpetto revealed that an account was opened on July 2, 1974, by Severino showing Nemes as President and Treasurer and himself as secretary. Nemes was the signatory on the account. (Tr. 993, GX 89, 90, 117). Between July 1974 and July 1975 a total of 32 checks were drawn by Nemes against Tarpetto for rent on her home, to her stockbroker and for cash and personal expenses. (GX 116A, B, D, E).

## F. The Investigation Begins—Nemes Aids In The Coverup.

During a standard field audit of Sprain Brooks' account in November of 1974, Kenneth Swan, an accountant employed by Travelers, questioned the accrual of $90,000 for the cleaning contract which Sprain Brook had with Limpio and received a copy of the contract from Karlin. (Tr. 441-3, 450, GX 19). Just prior to lunch, Karlin explained to Swan that Limpio was owned 10 percent by Olga Vera and 90 percent by Severino's grandchildren. (Tr. 965). During lunch with Severino and Nemes that same day, Karlin told Severino what he had told Swan. Severino told Karlin to tell Swan that Olga Vera owned 100 percent of the stock and the Severino grandchildren only held 90 percent as collateral (Tr. 965-6).* Immedi-

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* Severino told Karlin that the new owner of Sprain Brook owed him $90,000 on the sale price which was to be paid over the course of 3 years through Limpio. As security for Limpio

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ately after lunch Karlin told Swan he was wrong, that Olga Vera owned 100% of the company.*

During the summer of 1975, after the investigation of Sprain Brook's cost reports began,** Nemes told Karlin that the checks to Tarpetto were not for outside services (as previously shown in the books) but for loans. She went on to explain that Tarpetto had been formed by Olga Vera and herself and that she had borrowed the money from Limpio for some purpose which was vague to Karlin. (Tr. 937). Nemes went on to tell Karlin that she would pay the money back after she sold her jewels which she had smuggled out of Hungary (Tr. 938).

On August 11, 1975, a new corporate resolution for Tarpetto dated July 16, 1974, was filed with the bank by Nemes naming Olga Vera as president and herself as secretary with a signature card showing each as a signatory on the account (Tr. 1411, GX 91, 92).***

On September 7, 1975, Nemes deposited $10,095.88 to her personal checking account. The deposit consisted of her pay check and four other checks drawn on Kent Nursing Home and signed by Severino. (GX 108A-F). On September 16, 1975 Nemes drew a check for $9,300

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paying Severino 90 percent of its stock was held as collateral by the Severino grandchildren (Tr. 281). No explanation was ever disclosed as to why Limpio, an allegedly unrelated corporation, was used as a conduit for repayment of a $90,000 debt from Book to Severino. Moreover, Book flatly denied the existence of any such debt or arrangement. (Tr. 1425-6).

* The ownership of Limpio was important to Swan since if it was owned by Severino's grandchildren it would be considered a "related organization". In such a case the nursing home could not claim contract price (which includes cost plus profit) but only cost. (Tr. 131-3, 343, 357, GX 5C, 16A). The difference amounted to nearly $85,000 for the three year period.

** Olga Vera's first grand jury appearance had been on July 14, 1975.

*** GX 90, 91 and 92 were made by Nemes (with the exception of Vera's signature). (Tr. 1491).

on her account in favor of Tarpetto Cleaners and deposited it to the Tarpetto checking account (GX 109, 109A). On the same day she drew a $12,500 check on Tarpetto's account to Limpio.

### G. Nemes Helps Vera Remember

In later 1975 or early 1976, when Vera was again subpoenaed before a State Grand Jury,* she was asked about Limpio and Tarpetto. (Tr. 1459-60). Told to return for a subsequent Grand Jury appearance, Vera called Nemes for advice and was summoned to Nemes' home in Katonah, New York. During the meeting Nemes asked Vera if Vera didn't "remember" that she (Nemes) had asked Vera for money; that she borrowed the money; and that she redeposited the money. (Tr. 1461-5, 1469). Her recollection having been "refreshed" by Nemes, Vera returned to the Grand Jury.

Between February 6 and 17, 1976, Nemes drew four additional checks against Tarpetto in favor of Limpio totaling $4,630.50. (GX 116c).

### The Defendant's Case

Nemes presented no witnesses. Several checks and deposit slips were offered in an attempt to show that Nemes was repaying loans made to her by Tarpetto. (GX E, F, G).

## ARGUMENT

## POINT I

### The District Court Correctly Denied Nemes' Claim that this Indictment was Barred by Prior Immunized Testimony.

On appeal for the first time Nemes claims entitlement under *Kastigar* v. *United States*, 406 U.S. 441 (1972), to an evidentiary hearing on the issue of whether

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* Vera made a total of four appearances July 14, 1975; January 30, 1976; February 6, 1976; and February 27, 1976 (Tr. 1473).

or not the federal government made use or derivative use of testimony she had given before a New York State Grand Jury. The claim is without merit.

Well in advance of trial Nemes filed a notice of motion seeking the dismissal of the indictment against her on the theory that

> . . . the defendant CLARA NEMES received immunity from prosecution pursuant to New York's C.P.L. § 190.40 and as such is immune from prosecution of this indictment. (A. 25)

The notice of motion included two unrelated purported grounds for dismissing the indictment and incorporated claims previously raised in a motion by her co-defendant Manlio Severino, including the claim (not raised on this appeal) that records submitted to the federal grand jury were tainted. Nemes' notice of motion was not supported by an affidavit or a memorandum of law.*

Though this motion did not properly raise the issue of the Government's use of her immunized testimony, the Assistant United States Attorney in charge of the case nonetheless denied any such use. In his affidavit in opposition to Nemes' motion he declared that

> . . . we have not seen or used her testimony before the state grand jury or to any state investigator. (A. 28)

Counsel for Nemes made absolutely no factual or legal response to this sworn assertion.**

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* The absence of an affidavit of someone with personal knowledge clearly precluded the District Court from ever being able to grant Nemes any relief. The absence of a memorandum was in violation of Rule 9(b) of the local rules, which specifically states that "failure to comply may be deemed sufficient cause for the denial of the motion . . ."

** At the hearing on this and other motions made by codefendants the following colloquy took place:

Mr. Russo: . . . there is one further point I would

[Footnote continued on following page]

like to add in addition to those of other counsel. That is, in April and June of 1975 Clara Nemes testified before the Westcheser and Putnam County Grand Juries pursuant to a subpoena isssued by the special state prosecutor. She testified, your Honor, not as a custodian of records and not pursuant to a subpoena duces tecum but rather pursuant to a subpoena served upon her personally, for her testimony in substance. So, therefore, your Honor, I don't think we have to get to the point alluded to by co-counsel in this case regarding the Slutsky determination about close family held situations.

I don't think there is any doubt in this situation that Clara Nemes received immunity when she testified before the Westchester and Putnam County Grand Juries. The substance of her testimony before those—

The Court: You mean because state law says that if you testify—

Mr. Russo: You receive immunity automatically. No need to claim a privilege. Automatic grant unless you sign a waiver.

She did not sign a waiver of immunity. She did not testify as a custodian of books and records and accordingly it is our contention that she received immunity, full immunity without any exceptions.

Accordingly, your Honor, I don't think we have to reach the points alluded to by Mr. Morvillo in discussing the Belles and the Slutsky cases, but rather we are left with the basic principle that when a person receives immunity the immunity is full. And I think the situation is present here, your Honor.

The Court: So your motion is only for immunity?

Mr. Russo: Aside from the discovery aspects, which I join in the prior determinations of the Court. Yes, *I contend she has received immunity and therefore the indictment is dismissible on those grounds.*

I would mention, your Honor, one further thing, that the substance of the Westchester and Putnam County Grand Juries are absolutely parallel with the situation before the Court.

Mr. Wilson: Your Honor, may I be heard in answer to that?

The Court: Yes.

Mr. Wilson: *If Clara Nemes has testified before the grand jury, and we don't contest she has, u. have not re-*

[Footnote continued on following page]

Judge Wyatt denied the motion and the case went to trial.* The general issue of Nemes' immunized testimony was raised at least three times during the trial. (Tr. 798-800, 915, 1537). On all three occasions it was plain to all, including defense counsel, that the Government did not have, nor did it seek, possession of the testimony.

Defense counsel never once requested an evidentiary hearing or contested the Government's denial of any use or derivative use of that testimony. In fact, during the most extended discussion of the issue the following colloquy took place:

> "MR. WILSON: I think what I would prefer to do is to—if counsel wants it now, and he is

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*ceived any transcripts from the prosecutor on that at all. We have absolutely nothing concerning her.*

The Court: If she testifies before a state grand jury and therefore gets immunity, don't you have to respect that immunity?

Mr. Wilson: No, I don't think we do. She didn't turn her own records over.

The Court: I would assume that she is an employee and therefore she had nothing to do with the situation whether to turn the records over or not.

Mr. Wilson: That's correct. She was a bookkeeper.

The Court: I had already assumed that.

Mr. Wilson: The state can't indict her but our grand jury considering independent evidence we contend they are not tainted.

The Court: You didn't use any of her testimony?

Mr. Wilson: *We did not* . . . . (Hearing Tr. 34-36) [emphasis added].

Once again defense counsel made it plain that he was seeking dismissal of the indictment on the grounds of immunity, rather than raising any issue of taint. Once again the prosecutor denied any use of or access to the testimony. And once again defense counsel failed to dispute the Government's representation or request further proceedings.

* Judge Wyatt's memorandum opinion read as follows:

This is a motion for defendant Nemes for dismissal of the indictment. The grounds stated in defendant's notice

[Footnote continued on following page]

willing to stipulate or to concede that we have a right to review the testimony with the understanding it will not be used unless she testifies, then we will take it now. If he is unwilling to do this, I think in order to protect the record you should hold it in escrow for us until such time as there is a more positive determination made on the record.

THE COURT: All right.

What do counsel for the defendants want to do about that proposition?

MR. RUSSO: I have no problem with letting Mr. Wilson have the testimony of Mrs. Nemes, had hopefully he will be able to reproduce it for us. . . ." (Tr. 801-802)

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of motion are the same as those relied on by defendant Manlio in a separate motion.

If, however, defendant Nemes' claim of immunity is based not only on the production of records (to which that of defendant Manlio Severino is restricted) but on actual testimony in a state proceeding, the government would be barred from making any use of that testimony, but would not be barred from prosecuting her without making any use of it. *United States* v. *Keilly*, 445 F.2d 1285, 1287 (2d Cir. 1971), cert. denied 406 U.S. 962 (1972). The government here has denied any use, or even receipt, of such testimony as well as any desire to make use of it in the future.

For the reasons stated in an order with memorandum opinion being filed to decide the motion of Manlio, this motion for defendant Nemes is denied.

Judge Wyatt's citation to *United States* v. *Keilly*, 445 F.2d 1285, 1287 (2d Cir. 1971), *cert. denied*, 406 U.S. 962 (1972) (a case where appellant claimed he was protected in the federal courts by the state grant of immunity) demonstrates that while he was aware of the *Kastigar* issue he did not understand Nemes to have raised it. Nevertheless, he noted that the Government had denied any use of the testimony.

Nemes' claim that on this record the District Court somehow should have devined that Nemes requested and was entitled to an evidentiary hearing is without merit. First, it should be noted that Nemes never properly raised the issue or put the Government to its proof. In *Kastigar* v. *United States*, *supra*, 406 U.S. at 460, upon which Nemes now principally relies, the Supreme Court noted, quoting from *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79 n.18 (1964), "*Once a defendant demonstrates that he has testified, under a state of grant of immunity, to matters related to the federal prosecution,* the federal authorities have the burden of showing that their evidence is not tainted. . . ." (Emphasis added) See also *United States* v. *Kurzer*, 534 F.2d 511, 515-16 (1976). Nemes never even attempted this demonstration. While her motion papers made the conclusory claim that Nemes "received immunity from prosecution . . . and as such is immune from prosecution of this indictment," (A. 25), that allegation in itself was clearly insufficient to meet her initial burden under *Kastigar*. See, e.g., *United States* v. *Armedo-Sasmiento*, 545 F.2d 785, 796 (2d Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3601, (March 7, 1977) (attorney's conclusory affidavit insufficient to demonstrate his client's standing to raise a Fourth Amendment claim). Indeed, since the motion paper did not contain any allegation of fact based upon "personal knowledge," it did not raise any facts at all, *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967), and certainly "did not state sufficient facts which, if proven, would have required the granting of the relief requested." *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970); see also *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960); *United States* v. *Tucker*, 262 F. Supp. 305, 309 (S.D.N.Y. 1966); see generally, Wright, *Federal Practice and Procedure* § 675 (1969). Nemes never alleged in the District Court that she in fact testified before the New York grand jury

about "matters related to the federal prosecution,"* or that her testimony was truthful, cf. *United States* v. *Housand*, Dkt. No. 76-1156, slip op. 1999 (2d Cir., Feb. 25, 1977). In short, Nemes has at all times refused to make even the most elementary allegation necessary to put the Government to its proof.**

On this record, then, the response of the prosecutor and of the District Court was entirely proper. Even if Nemes testified about *something* before a state grand jury under immunity, she received only use and derivative use immunity with respect to what she said. When a proper initial demonstration has been made, the prosecutor may meet his burden of showing lack of taint either by proving that he had no direct or indirect access to the minutes, thereby proving that his sources could only have been independent, or by proving that, whether or not the the prosecutor had such access, he had other, unconnected sources for every bit of evidence supporting the indictment and adduced at trial. *Cf. United States* v. *Bianco*, 534 F.2d 501, 508-511 (2d Cir. 1976), *cert. denied*, — U.S. — (1977). For obvious reasons of convenience, the path of proof most often taken has been the former. See *id.* at 508-511. Given the totally insufficient showing by Nemes, the prosecutor's response in this case specifically denying any contact with the testimony in the grand jury was more than adequate. Indeed, for Nemes now to claim

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* Indeed, for whatever reason, Nemes continues this reluctance on appeal. While her brief notes that she appeared before a state grand jury that was also investigating possible violations by her co-defendants, it coyly refrains from stating that she actually testified at that grand jury about the facts underlying this offense. Brief at 17-18. Since she must actually testify under immunity to be covered by *Murphy, Kastigar* and their progeny, this omission at all stages of the prosecution is fatal.

** This failure simply cannot be viewed as being based on oversight or lack of knowledge, since it was clear at trial that counsel for Nemes (unlike the Government, which still has not seen the purported immunized testimony) actually had a copy of her grand jury testimony in their possession. (Tr. 915).

that the Government should have provided, through a hearing, a detailed demonstration of lack of taint with respect to everything about which she may have testified ignores the fact that she never informed the District Court or the Government of the scope of her grand jury testimony; in short, she claims that the Government should have refuted something that it was not only never asked to refute but about which it was kept ignorant by Nemes.* Neither common sense nor any case cited by Nemes requires such an absurd result. In each of the cases she cites, the suggestion of taint was strong from the outset either because the prosecutor had access to the relevant immunized testimony, *United States* v. *Catalano*, 491 F.2d 268 (2d Cir. 1974), because the federal prosecution team included an attorney who had previously served on the state prosecution team, *United States* v. *Catalano*, *supra*, 491 F.2d at 272 *et seq.*; *United States* v. *Bianco*, *supra*, 534 F.2d at 508 *et seq.*, or, in one case, because the grand jury that indicted the appellant had heard him give the immunized testimony, *United States* v. *Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976).

In short, Nemes' claim must be rejected.

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* Moreover, the general nature of the testimentary and especially the documentary evidence submitted against Nemes is such as to show on its face that the Government's case was not in any sense derived from testimony it never had access to. For example, the large bulk of documents put into evidence was first requested by a subpoena dated November 10, 1975, and the whole structure of the examination of each Government witness demonstrates that the Government's case was developed from such documents, *i.e.* from evidence it sought well before appellants' 1976 state grand jury testimony.

## POINT II

### The Tarpetto Evidence Was Properly Admitted.

Nemes argues that the trial court committed reversible error in admitting evidence of the Tarpetto-Limpio relationship and of Nemes' role in it. In particular, she claims that the "slight" or "questionable" relevance of the evidence was outweighed by its prejudicial character, and that a portion of the evidence was "rank hearsay."* This claim is without merit since the Tarpetto evidence was of obvious relevance to the very issues most hotly contested at trial and was properly admitted by the cautious District Court.

Nemes' assertion rests principally upon the fact that the Tarpetto evidence related to events in 1974-1976, while the last fraudulent cost reports were filed on April 29, 1974 (for the year 1973). This observation, however,

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* Nemes' claim, for the very first time on appeal, that a portion of this testimony was hearsay may be quickly answered. While counsel for Nemes in their brief claims that the testimony came in over objection, Brief at 14,22, he neglects to inform the Court that the objection was *only* to the issue of relevance; Nemes *never* claimed in the District Court that any portion of the evidence was hearsay. Thus, her present claim in this regard is barred by the specific language of Fed. R. Evid. 103(a) barring review on the admission of evidence unless "a timely objection or motion to strike appears of record, *stating the specific ground of objection. . . .*" See also *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Since, as Nemes concedes, Brief at 27, other witnesses would have been available had this objection been brought to the attention of the court and sustained, it follows that even if error were committed, it was clearly not "plain error." Fed. R. Evid. 103(d); Fed R. Crim. P. 52(b). Furthermore, counsel for Nemes compounded his failure to object to this evidence as hearsay by himself going into the matter on cross-examination and indeed expanding on the presentation of evidence. (Tr. 1463-71). In that posture, she can hardly now complain that the trial judge should have *sua sponte* anticipated her present claim.

ignores the relevance of the Tarpetto evidence to show the scope and continuing existence of the conspiracy charged in the indictment (which was alleged to continue up to the date of the filing of the indictment in 1976) and more particularly Nemes' participation in it. The conspiracy charged encompassed not only the filing of the false cost reports, but also various acts of concealment and deception meant to hinder and obstruct the administration of the applicable laws. *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). In addition, it is settled law that even evidence occurring outside the dates of the conspiracy is admissible to show the "background" of the conspiracy, *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), or "development," *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975), or the "pattern of conduct" of the conspirators, *United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Erb*, 543 F.2d 438, 442 (2d Cir. 1976). In particular, this Court has held on numerous occasions that proof of crimes not the specific subject of the indictment is admissible to show relationships among the conspirators, *United States* v. *Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); *United States* v. *Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975). The Tarpetto evidence was clearly admissible for these purposes. For example, while the cost reports filed with respect to Sprain Brook showed the cost of cleaning services purportedly rendered by Limpio, it did not in itself show the lack of an arms-length relationship between Sprain Brook and Limpio. This lacuna was met by the Tarpetto evidence, which showed clearly that both Limpio and Tarpetto were under the control of the defendants, who were thus able to siphon funds from Sprain Brook.*

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* Even if one were to view this argument in the strictest sense as showing only *Severino's* control of Limpio, it was none-

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In addition, of course, the Tarpetto evidence was clearly admissible to show Nemes' motive, knowledge, and intent. As Nemes herself notes in her Brief at 36, these issues were "crucial" at trial, where Nemes contended that she was a "mere bookkeeper." * See, e.g., *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (Oct. 5, 1976); *United States* v. *Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States* v. *Grady*, 544 F.2d 598 (2d Cir. 1976); *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973).** The Tarpetto evidence shows, among other things, that Nemes in a one year period wrote 32 checks against Tarpetto to pay her personal expenses; that she filed a revised banking resolution, predated by one year, designed to conceal Severino's ownership and control of Tarpetto and, hence, of Limpio; and it showed her lying to Karlin and influencing the testimony of Olga Vera. Thus, the Tarpetto evidence shows that Nemes was motivated by personal gain and, perhaps, by a sense of allegiance to Severino and that she engaged in purposeful and intentional conduct designed to conceal and deceive.

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theless admissible to show the existence of the conspiracy in which Nemes joined. As this Court held in *United States* v. *Araujo*, 539 F.2d 287, 289 (2d Cir. 1976), evidence of acts not the subject of the indictment are admissible to show the existence of the conspiracy, even if they do not involve a defendant on trial. In addition, of course, the evidence also demonstrated Nemes' participation in the overall scheme.

* At any rate, the law is clear that the Government is entitled to introduce such evidence in its direct case in order to meet its burden of establishing the essential elements of the offense, and need not wait until the issue is raised by the defendant. *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1970).

** Indeed, the reasoning in *United States* v. *Miller*, *supra*, controls this case. In *Miller*, the proof showed that the defendant drove a getaway car in a bank robbery, but not that he actually knew about the robbery itself. This Court held that admission of proof of his participation in another robbery, not charged in the indictment, was permissible to show "that the appellant was not merely an innocent participant" in the crime. 478 F.2d at 1318.

Finally, it should be noted that this Court's review of the District Court's determination in this regard is exceedingly narrow. The law in this Circuit is that such evidence is admissible, if relevant, except when offered solely to prove criminal character or disposition. *United States* v. *Chestnut*, *supra*; *United States* v. *Papadakis*, *supra*; *United States* v. *Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); see generally, Fed. R. Evid. 404(b). Furthermore, the District Court has a "wide range of discretion" in admitting such evidence. *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3253 (Oct. 5, 1976). As this Court noted in *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), such a determination "is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." See also *United States* v. *Rosenwasser*, Dkt. No. 76-1260, slip op. 1973, 1979 (2d Cir. Feb. 24, 1977). Particularly since any prejudicial effect of the testimony must have been dissipated by abundant testimony elsewhere in the trial of various forms of self-dealing and fraudulent deception, absolutely no abuse of discretion on the part of the District Court can be shown.*

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* The principal case cited by Nemes for the contrary proposition that the prejudicial impact outweighed its probative value is *United States* v. *Robinson*, 544 F.2d 611 (2d Cir. 1976). That decision, however, reiterated the principle that the trial judge has wide discretion in making this determination, 544 F.2d at 616. Furthermore, while two members of that panel concluded that the judge had abused his discretion in that case, this court has agreed to reconsider that conclusion *en banc*.

## POINT III

### The Evidence Supporting Nemes' Conviction Was More Than Sufficient.

Contrary to the contention in Point III of Nemes Brief, the evidence of her guilt was more than sufficient to sustain the verdict, as the jury itself demonstrated by its quick deliberation.

Initially, it should be noted that in making her argument Nemes ignores not only many of the facts showing her guilt but also the relevant standard to be exercised by this Court. As the Court has noted, once a conspiracy has been established—and Nemes wisely concedes that this was done (Brief at 29)—only the slightest evidence is necessary to demonstrate a defendant's participation in it. *United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). Furthermore, the sufficiency of this evidence must be viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Tropiano*, 418 F.2d 1069, 1074-75 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). Indeed, as this Court has recently stated in a case somewhat analogous to this one, "we may not substitute our view of the evidence for that of the jury." *United States* v. *Sears*, 544 F.2d 585, 586 (2d Cir. 1976).

Furthermore, the jury had before it not only overwhelming proof of wide-ranging and continuous fraud but of Nemes' continued association with the participants in the fraud in a position of trust and responsibility, a factor noted by this Court in determining the sufficiency of the evidence in *United States* v. *Erb*, 543 F.2d 438, 446 (2d Cir. 1976). See also *United States* v. *Hanlon*, Dkt. No. 76-1340, slip op. 1445, 1450 (January 18, 1977). Indeed, as Judge Hough has noted,

> "[W]hile there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situa-

> tion and continuity of conduct an inference that he *did* know the untruth of what he said or wrote may legitimately be drawn"

*Bentel* v. *United States*, 13 F.2d 327, 329 (2d Cir.), *cert. denied, sub nom. Amos* v. *United States*, 273 U.S. 713 (1926) (emphasis in original).* In this case, the jury saw that Nemes was a trusted bookkeeper with complete responsibility for Sprain Brook's books and records (Tr. 670, 689-91), and continuously from December 1971 began preparing checks for personal expenses of Severino and his relatives—expenses that could be traced directly to entries on the fraudulent cost reports. (Tr. 809-16). Thus, even though this Court has held that the participation in a conspiracy of someone in Nemes' position may be demonstrated by mere silence, *United States* v. *Eucker*, 532 F.2d 249, 254 (2d Cir. 1976), the evidence here was considerably more direct.**

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* Similarly, Judge Learned Hand wrote

> "It is true that all these instances, taken singly, do not prove beyond question that White knew that the statements which he prepared were padded with false entries; but logically the sum is often greater tha[n] the aggregate of the parts, and the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone."

*United States* v. *White*, 124 F.2d 181, 185 (2d Cir. 1941).

** It should be noted that while the sufficiency of the evidence that the United States was actually defrauded was overwhelming (and is not contested by Nemes), the Government need not show that Nemes *knew* that the federal Treasury was the object of the obvious frauds she helped commit, since this was clearly a "jurisdictional" element that need be proven neither for the substantive offense nor conspiracy to commit the offense. *United States* v. *Feola*, 420 U.S. 671, 696 (1975); *United States* v. *Viruet*, 539 F.2d 295, 297 (2d Cir. 1976).

At any rate, even this element was met. Nemes' knowledge in this regard can be inferred from the pervasive documentation regarding Federal payments in the Sprain Brook records. In

[Footnote continued on following page]

Finally, of course, the Tarpetto testimony and the evidence of her course of deceit and obstruction were telling facts clearly demonstrating that her long association with Severino was not innocent.* As this evidence showed, Nemes drew a total of 32 checks against Tarpetto for her personal expenses (GX 116A, B, D, E). In addition, Nemes lied to Karlin, telling him that Limpio's payments to Tarpetto were mere loans and that Tarpetto had been formed by her and Olga Vera raher than her and Severino. (Tr. 937-38). In addition, she attempted to influence the grand jury testimony of Olga Vera (Tr. 1461-65, 1469) and filed a new banking resolution in August 1975, dated a year earlier, which differed from the original banking resolution principally in that it did not show Severino as an officer of Tarpetto. (Tr. 993, 1411, GX 89-92).

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addition, a conspiracy to defraud the Government, which has been given a "broad construction" by the Supreme Court and this Court, *United States* v. *Jacobs*, 475 F.2d 270, 282-83 (2d Cir. 1973), *cert. denied, sub nom., Thaler* v. *United States*, 414 U.S. 821 (1973), is demonstrated when the Government is thwarted in its legitimate activities, even absent pecuniary loss. *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924); *Glasser* v. *United States, supra*, 315 U.S. at 66. Nemes met with Swan, the auditor of Sprain Brook's accounts, on numerous occasions and was clearly aware of the Government's interest in the accounts. Indeed, she was present when Severino instructed Karlin to tell Swan that Limpio was owned 100% by Olga Vera (who could neither read nor write), rather than 10% by Vera and 90% by Severino's grandchildren as Karlin had previously told Swan. (Tr. 965-66). While the conspiracy also had other objects, this Court has recently reiterated the principle that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any of the acts charged." *United States* v. *Droms*, Dkt. No. 76-1232, slip op. 2035, 2038-39 (2d Cir., February 25, 1977); see also *United States* v. *Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976).

* In *United States* v. *Stanchich*, Dkt. No. 76-1407, slip op. 1277, 1288 (2d Cir., January 6, 1977), this Court specifically made reference to admittedly "similar act" evidence to ascertain the sufficiency of the showing of the defendant's guilt.

In short, the jury was fully justified in finding the evidence overwhelming.

## POINT IV

### The Trial Judge Properly Charged The Jury On The Issue Of Intent.

Nemes claims not only that the prosecution failed to introduce evidence sufficient to establish her specific intent to violate the law but also that the trial judge failed to charge the jury that such a showing of specific intent was required under 18 U.S.C. § 371.* She argues that since specific intent to violate the law is a requisite element of the crimes set out in 18 U.S.C. §§ 1001 and 287, it must also be an element of the crime of conspiracy to violate those statutes. This argument is based entirely upon taking certain portions of the charge out of context, and in addition is utterly unsupported by the decisions upon which Nemes relies.

In the relevant portion of his instructions to the jury, Judge Wyatt clearly explained that there were, in effect, two different theories of conspiracy put forward by the Government.

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* After giving the jury instructions, Judge Wyatt asked defense counsel whether he had any exceptions and the following colloquy insued.

> Mr. Russo: *I have no exceptions, your Honor.*
>
> I have certain requests which I brought with me to include in the Court's charge.
>
> First of all, I request that the Court charge the jury that specific intent to advance the objects of the conspiracy is necessary, pursuant to the Cangiano case, 491 F.2d 906——
>
> The Court: It is too late for me to consider requests to charge now. As you know, the requests to charge were due on the Friday before we began the trial.
>
> Mr. Russo: I understand that, your Honor. I understand and I expected these to be covered on the Court's charge on conspiracy, and I feel that it is necessary that the jury be instructed on specific intent.
>
> The Court: Well, I won't give any *more* charge on that. (Tr. 1687-88) (emphasis added).

> The Government has the right to have the expenditures of its funds in Medicare and Medicaid programs conducted free from fraud, deceit, misrepresentation, concealment, interference or obstruction. Thus, the term "conspiracy to defraud the United States" is an allegation that the defendant conspired to furnish false information to and withhold truthful information from the Department of Health, Education and Welfare, which is of course an agency of the United States within the meaning of the statute.
>
> The conspiracy is *also* charged to have had as its object the violation of two federal criminal laws. Section 287 of Title 18 of the United States code makes it an offense for anyone knowingly to make a false claim upon or against an agency of the United States. Section 1001 of Title 18 of the U.S.C. makes it an offense knowingly and wilfully to make false statements or to use any false writing or document in connection with matters within the jurisdiction of any federal department or agency, knowing that the document contains false information. (Tr. 1671-72). (Emphasis added).*

After articulating both theories of conspiracy, under 18 U.S.C. § 371, Judge Wyatt went on to define the term "conspiracy":

> Now we come to the large question, what is a conspiracy. *A conspiracy is a combination or an agreement by two or more persons by concerted action to accomplish a criminal or unlawful purpose,* in this instance to defraud the United States

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* By focusing only on the claim of conspiracy to violate 18 U.S.C. §§ 287 and 1001, Nemes entirely ignores the charge of conspiracy to defraud the United States Government, a conspiracy which did not and need not have as its object the commission of a substantive crime. 18 U.S.C. § 371; *Falter* v. *United States*, 23 F.2d 420, 423 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

within the meaning of that term as I've explained it and to violate laws concerning the making of false claims and the making of false statements to an agency of the United States.

*The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law or to defraud the United States.* As I said a moment ago, whether or not the conspiracy is accomplished what they conspired to do, is immaterial to the question of their guilt of the charge of conspiracy.

Members of the jury, a conspiracy is called a partnership in crime in which each conspirator, each member of the conspiracy, becomes the agent and partner of every other member. But to establish a conspiracy the Government is not required to show that two or more persons sat around a table and entered into a solemn pact orally or in writing stating that they have formed a conspiracy to violate the law and setting forth the details of the plan, the means by which the unlawful project will be carried out and the part to be played by each conspirator.

It would indeed be most extraordinary if there ever were such a formal document or specific oral agreement in the case of a criminal conspiracy. Your common sense would tell you that when men and women in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding. From its very nature, a conspiracy is almost always secret in its origins and secret in its execution.

*It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly come to an understanding in common to defraud the United States or to violate the law.* (Tr. 1674-75). (Emphasis added).

In this portion of the charge the jury was told no fewer than three times that it must find that the conspirators actually agreed to violate the law or defraud the United States.

Finally, Judge Wyatt instructed the jury that they must find that the individual defendant "knowingly" and "wilfully" joined the conspiracy.

> Now, you heard the words "wilfully and knowingly." "Knowingly" of course, means to do an act voluntarily and intentionally and not because of mistake or accident or some other such innocent reason. *"Wilfully" means to act knowingly, deliberately and with a bad purpose and motive,* but it is not necessary that the defendant know that she is breaking any particular law.
>
> Now, members of the jury, the mere association of a defendant with an alleged conspirator or mere knowledge of the conspiracy does not alone establish participation in a conspiracy, if you find that the conspiracy existed. *In determining whether the defendant Mrs. Nemes was a member of the conspiracy you should consider whether in some sense she joined and promoted the venture, did what she could to bring it about, had some stake or interest in its outcome.* (Tr. 1677). (Emphasis added).

Read as a whole, as it must be,* this charge was more than adequate on the issue of the requisite state of mind under 18 U.S.C. § 371. Indeed, it repeated to the print of redundancy the instruction that a "deliberate agreement" to violate the law or defraud the United States was essential to a conviction. Though Judge Wyatt did not use the catch-words "specific intent," his instructions

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* See *United States* v. *Guillette,* Dkt. No. 76-1249, slip op. 1165, (2d Cir., Dec. 20, 1976); *United States* v. *Hanlon,* Dkt. No. 76-1340, slip. op. 1445 (2d Cir., Jan. 18, 1977); *United States* v. *Magnano,* 543 F.2d 431, 435 (2d Cir. 1976); see generally *Cupp.* v. *Naughten,* 414 U.S. 141, 146-47 (1973).

stressed the components of that concept. The jury was told it must find that there was a deliberate agreement to violate the law or defraud the United States, that Nemes joined that conspiracy knowingly and willfully, and that her participation was characterized by an intent to further the illegal or fraudulent aim of the conspiracy. Since it is both logically and practically inconceivable that the jury could have found that Nemes "agreed" to violate the laws without intending to do so, it follows that the charge was proper.* Cf. *United States* v. *Jacobs*, 475 F.2d 270, 283-84 (2d Cir.), *cert. denied, sub nom. Thaler* v. *United States*, 414 U.S. 821 (1973).

In fact, the case defense counsel cited to Judge Wyatt in support of his late request to charge specific intent, *United States* v. *Cangiano*, 491 F.2d 906, 909-911 (2d Cir. 1974), demonstrates that these elements are sufficient to establish specific intent even where the conspiracy charged under 18 U.S.C. § 371, consists of an agreement to violate a predicate substantive offense. Accordingly, those elements suffice under either theory of conspiracy presented to the jury in this case. Indeed, the evil noted in *Cangiano* and the other decision upon which Nemes now principally relies, *United States* v. *Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975), was the instruction to the jury that a defendant "intends the reasonable and probable consequences of his actions," a charge this Court has consistently held to be improper where a crime involving specific intent is alleged. *United States* v. *Erb*, 543 F.2d

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* This Court's decision in *United States* v. *Gentile*, 530 F.2d 461 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3545 (June 14, 1976), is instructive. In that case the District Court concededly failed to instruct the jury on the element of knowledge with respect to the conspiracy count. Looking at the charge as a whole, however, the Court found that the instructions on knowledge in the general portions of the charge "adequately advised the jury" of the required element. *Id.* at 469-70.

438, 447 (2d Cir. 1976).* That language was totally absent in Judge Wyatt's charge. Similarly, the other cases upon which Nemes relies involved instructions where the jurors were affirmatively misled about the elements of the crimes. See, e.g., *United States* v. *Gallishaw*, 428 F.2d 760, 762-3 (2d Cir. 1970); *United States* v. *DeMarco*, 488 F.2d 828, 832 (2d Cir. 1973). In this case, the instructions as a whole clearly imparted to the jury a complete understanding of the elements of the offenses before them.

In short, the refusal to grant Nemes' tardy request that the jury be recharged on a matter that had already been fully explained to them is no grounds for reversal. If the failure to use the catchwords "specific intent" was error at all, it was surely harmless in the context of this case and of the charge as a whole. Cf. *United States* v. *Hanlon*, Dkt. No. 76-1340, slip op. 1445, 1454 (2d Cir., January 18, 1977).

## POINT V

### The Government's Summation Contained No Improper Argument.

Nemes asserts for the first time on appeal that the prosecutor's conduct at trial was improper in that (A) his summation contained the argument that appellant had forged Olga Vera's signature to Limpio checks when that argument was contradicted by the Government's handwriting expert; (B) his summation included his

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* In *United States* v. *Erb*, *supra*, this charge was given. Holding that it was error, since it might possibly appear "to shift the burden of proof to the defendant," 543 F.2d at 447, this Court nonetheless upheld the conviction, noting that the jury had been charged that they must find that the defendant associated himself with the crime "as something he wishe[d] to bring about." This last language was given in substantially the same form by Judge Wyatt. Since that language was sufficient to save a charge containing clearly improper and inconsistent language, it follows *a fortiori* that it must be sufficient to apprise the jury of the law in this case.

own testimony; (C) his opening statement, summation and rebuttal all contained the allegedly improper assertion that Nemes controlled Limpio; (D) he argued that the Tarpetto evidence showed that Nemes was involved in "laundering" money; and (E) his summation referred to Nemes' failure to testify.

These protestations of misconduct are particularly suspect given the total failure of defense counsel to make any timely objection on any of these points. That failure not only indicates his own lack of confidence in their significance, but also constitutes a waiver of the claims now raised for the first time. *United States* v. *Head*, 546 F.2d 6, 8 (2d Cir. 1976); *United States* v. *Ong*, 541 F.2d 331, 342-3 (2d Cir. 1976); *United States* v. *Canniff*, 521 F.2d 565, 571-2 (2d Cir. 1975), *cert. denied, sub nom. Benigno* v. *United States*, 423 U.S. 1059 (1976). At any rate, the arguments are meritless.

## A. The Prosecutor's Argument Concerning Possible Forgery of the Signature on the Kentnur check Was Proper

In his summation, the prosecutor argued that it was not "unreasonable" for the jury to find that Olga Vera's signature on the "Kentnur" check was forged either by Nemes or Severino.* (Tr. 1573-4) In fact, it was not

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* His full argument consisted of the following:

Now, the next thing that happens is that during the summer of 1973 another check is written out by Mr. Severino, or at least it is prepared by Mr. Severino, and this is check, exhibit in evidence 101, which seems to have disappeared in this pile of papers.

You will recall that check 101 was a check that Mr. Caputo testified about this morning. That was the check that was stipulated, that was made out to Kentnur Development for, I think, $1500 or $2000 and it was written to Kentnur Development in Manlio Severino's handwriting, was endorsed on the back in Manlio Severino's handwriting "Kentnur Development" out of Limpio, with the signature Olga Vera, the signature Mr. Caputo testified was a

[Footnote continued on following page]

"unreasonable" and Nemes' current suggestion that the prosecutor's remarks were prejudicial is not only tardy but misplaced.

Drawing a remark made by the Government's handwriting expert entirely out of context, Nemes argues that the prosecutor's contention that the signature was forged by Nemes or Serverino contradicted the Government's own proof. The full testimony of that expert, Luciano Caputo, shows that the contrary is true. Caputo testified, as the prosecutor indicated, that the signature "Olga Vera" on the Kentnur check had not been written by Vera. (Tr. 1499-1500). Nemes' brief on this appeal suggests that Caputo went on, in cross-examination, to admit that Nemes had not performed this forgery. In fact, Caputo made it absolutely clear on both direct and

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forgery, not a forgery by the same person, though, who forged the two signature cards.

You may find that since Salvatore Severino was Manlio Severino and he opened the bank account, you may find that Manlio Severino forged that signature for the first Limpio bank account.

Mr. Caputo was unable to say who forged the other signature. Olga—Clara Nemes, it has been demonstrated by the defense in cross-examination, did not have the authority to sign the Limpio bank account. It would not be unreasonable to draw the conclusion that either Clara Nemes or Manlio Severino made the Olga Vera signature on the Kentnur check.

Now, you recall the testimony of Mr. Karlin. Who has custody of the check book? Who write out the checks? All the writing on the payroll checks, which had been identified by Majorie Murphy and Rosemary McNamara, is either Severino's or Nemes' writing. You may find from that that Severino and Nemes had access to the Limpio checkbook. It wasn't Percy Karlin. Karlin is a traveling accountant that pops in once a week. So the Kentnur check was forged and you are free to decide that it was forged either by Mrs. Nemes or Mr. Severino.

cross-examination that because of the contrived nature of the signature on the Kentnur check he could not tell who signed it.*

Again, on cross-examination, Caputo said that he could not tell who signed the check, but he was confident it was not Olga Vera.** Then, in answer to another

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* On direct examination the following exchange took place:

A. Well, I would say it is an unnatural writing, and one of the reasons for an unnatural writing could be an attempt to disguise or copy, yes.

Q. Mr. Caputo, is it possible with this type of writing, that is, with a writing where an attempt to disguise has been made, to compare that writing with exemplars give by other people, other than Olga Vera, who would be asked to write that name? Would it be possible to make a comparison with any other person's exemplars and reach any kind of accurate conclusion?

A. Well, no, because if a person attemps to copy someone else's writing, he throws off or attempts to throw off his own characteristics and he assumes, or she assumes, the characteristics of the writings that he or she is trying to copy.

For example, if I copy someone else's writing, then I will incorporate some of those writing characteristics in what I am copying into my writing.

Now, when I am asked to give a sample of that writing, if I write it in my nromal wriitng, it will be different.

Q. So you have a questioned writing which is neither fish nor fowl. It is not that of the person who it purports to be and it is not that of the person who actually made it in that person's natural writing, it is somewhere in between.

A. That's correct. The only opinion I can offer is that the authentic did not. But I cannot say who did, because the copy is there. All I can say is authentic did not, because if three people were asked to copy, they would be similar. (Tr. 1510-11).

** "Q. Did you compare the exemplars from Clara Nemes with any of the questioned documents?

A. Yes, I did.

had written the signatures either "Olga Vera" or "Salvatore Severino"?

[Footnote continued on following page]

question from Nemes' attorney, Caputo gave testimony which, when juxtaposed with the rest of the evidence in this case, made the inference urged by the prosecutor eminently reasonable.*

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A. No, I have no opinion, because, as I say, I cannot say who did, all I can say is that the authentic did not." (Tr. 1514).

* This testimony was as follows:

"Q. Well, did you notice any characteristics in Mrs. Nemes' handwriting which were similar to the questioned documents?

A. Well, as I remember, the writing had a foreign accent.

Q. A foreign accent?

A. Yes. The formation of the "a" and so forth.

Q. Are there different characteristics in handwriting which are appropriate for different ethnic groups?

A. Well, that would depend on where they were taught how to write, yes.

Q. All right. In other words, would a Latin, a person of Latin extraction and heritage, have different characteristics in handwriting from a person of middle European heritage?

A. There would be some dissimilarities, yes.

Q. And did you notice any middle European characistics in Mrs. Nemes' handwriting?

A. I can't pinpoint which part or what part of the country or the world, because if you are taught one system and you accept or rather adapt all those principles, then we will say you learned the Palmer method. But each one writes differently.

Now, in writing the Palmer method, you may write one of the letters not in the Palmer method. It is an accidental writing which appears in the Peterson method.

So I cannot say definitely this person was taught the Palmer method, because in doing so he or she may have written some other writings accidentially.

All I can do is compare what was given to me and make some observations as to whether there appears to be an accent.

As to where that accent comes from, I'm not in a position to give you any help." (Tr. 1514-5).

Nevertheless, Nemes pulls a subsequent comment from its context to support the argument that the prosecutor contradicted his own witness. Indeed, it could not be clearer that by saying he had "examined a lot of [Nemes'] writing, but [he] was not able to tie her into any of these," (Tr. 1516) Caputo meant only that the forgery was unidentifiable, not that Nemes could not have performed it.

It was, therefore, as the prosecutor argued, not "unreasonable" in light of the uncontradicted evidence of forgery and all the evidence in the case linking Nemes and Severino to Limpio to find that Nemes or Severino forged that check. Nemes' distorted and belated argument to the contrary must be rejected.

## B. The Prosecutor Did Not Testify During His Summation

Nemes charges that the prosecutor committed prejudicial error by making the following summary of the evidence on Olga Vera's contacts with Nemes between Vera's sessions before the State Grand Jury:

> "A woman who has a poor memory, as testified to by her daughter. And all of a sudden she is brainwashed and goes back and spews this forth to the grand jury:
>
> "Oh, yes, it is my company and Clara Nemes and I are going to go out and make money and this and that and the other things," and the answers are supplied by Mrs. Nemes.
>
> Mrs. Nemes testified before the grand jury in the latter part of February through Olga Vera, told her the story."

In fact, far from giving testimony, the prosecutor was doing nothing more than summarizing the reasonable inferences that could be drawn from the evidence, including the testimony of Haydee Nobregas,* (Tr. 1459-

* That testimony had been heard only a day earlier.

1462), who was present during the conversation between Vera and Nemes. Especially when they are viewed in the context of the whole trial, *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), these inferences were entirely reasonable. See *United States* v. *Morell*, 524 F.2d 550, 557 (2d Cir. 1975); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States* v. *White*, *supra*.

Nemes' claim is particularly suspect not only because of the Judge's careful warning to the jury not to accept the lawyers' version of the facts, but, more importantly, because her counsel took several minutes of his summation to make the same warning. (Tr. 1589-90).

### C. The Argument That Nemes Controlled Limpio Was Proven And Proper

There was ample evidence from which the jury could find that Nemes was, with Severino, in "control" of Limpio Service, Inc. The only business of Limpio was to distribute and keep track of its payroll. (Tr. 709, 1127). Nemes prepared that payroll; she, Severino or Karlin would write out the payroll check; and she directed Marjorie Murphy on how to distribute the payroll. (Tr. 661, 708, 709, 1364). Moreover, Nemes and Severino took $200. to $250. a week out of the payments. (Tr. 715, 720-1, 1366-7). Over the life of the company they siphoned $24,000 to $26,000 from Limpio in this manner. (Tr. 963). In addition, Nemes kept the Limpio books and did its accounting. (Tr. 900, 1158, 1280). It was Nemes who wrote the check from Limpio to Tarpetto Cleaning Service that gave the latter company life. (Tr. 935). Nemes was the signatory on the Tarpetto bank account and became Tarpetto's President and Treasurer. (Tr. 993, GX 89, 90). The inference of Nemes' control or shared control from this and other evidence in the Government's case was perfectly permissible. See *United States* v. *Morell*, *supra*; *United States* v. *Wilner*, *supra*; *United States* v. *White*, *supra*.

## D. The Prosecutor's Remarks Were Not Inflammatory

In yet another attempt to demonstrate misconduct, Nemes contends that the prosecutor made unfair use of the Tarpetto evidence, which Nemes also attacks as inadmissible. See pp. 20-23, *supra*. She claims that the argument that she was involved in the "laundering of money" (Tr. 1550, 1571, 1579) was inflammatory and prejudicial. The Government submits that the remarks themserves and the evidence show otherwise.

The relevance of the Tarpetto evidence has been amply demonstrated above. On the three occasions in which the prosecutor used the phrase "laundering" concerning this evidence (Tr. 1550-1, 1571-2, 1579-80) he was describing, *inter alia*, a transaction that occurred over the course of about ten days in which Nemes deposited $10,095.88 (her paycheck and four checks signed by Severino) in her personal account (GX 108A-F), then drew a check for $9,300 on that personal account for Tarpetto and deposited the check in the Tarpetto account (GX 109, 109A), and finally drew a $12,500 check on Tarpetto's account in favor of Limpio.

Once again, the prosecutor's inferences and summary of the evidence were reasonable. Certainly the use of the word "laundering" was an accurate characterization of the permissible inference he wished the jury to draw. It hardly approaches the prosecutor's remarks in *United States* v. *White*, *supra* (a case cited by Nemes in which the Court affirmed the conviction before it despite the prosecutor's repeated claim in summation that defendant was "lying" and the defense was "fabricated"). See also *United States* v. *Bivona*, 487 F.2d 443, 445-7 (2d Cir. 1973).

The use of the word "laundering" may indeed have been a powerful argument by the prosecutor, but it was one which fit the Government's proof. See *Myers* v. *United States*, 49 F.2d 230, 231-32 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931). Given the clear evidentiary

predicate for the prosecutor's remarks and the trial evidence as a whole, and particularly in the absence of any objection, the prosecutor's remarks were proper.

### E. The Prosecutor Did Not Comment Improperly on the Defendant's Failure to Testify or to Produce Evidence

In several places in his initial and rebuttal summations, the prosecutor urged the jury to make certain inferences as to matters about which the evidence was circumstantial. Again pulling these and other remarks from their context, Nemes argues that the prosecutor was improperly making an "oblique" reference to her failure to testify or present evidence.

In most of the portions of the Government's argument extracted by Nemes the prosecutor was laying the groundwork for a wholly proper inference he was about to ask the jury to draw and not referring in any sense to Nemes' failure to take the stand or present evidence.* The context of each remark makes it plain that the argument was not directed at the defendant's failure to explain but rather at the judgments the jury could make from the evidence it did have. See *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970); *Lefkowitz* v. *United States*, 273 F.2d 664, 668 (2d Cir.), *cert. denied*, 257 U.S. 637 (1921).

Even if the remarks could in some sense be seen as referring to the defense's failure to put in evidence they in no way referred even "obliquely" to Nemes' failure to testify. The Government may comment on the defense's

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* Tr. 1569, 1583, 1585, 1651.

Just before the last of the remarks at the above pages, the Assistant United States Attorney explicitly explained the structure of his argument:

> The evidence must speak for itself. There is nothing in the evidence that says one way or the other. *Therefore, you must draw inferences from the evidence.* (Tr. 1650) (emphasis added).

failure to contradict the Government's case. *United States* v. *Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976); *United States* v. *Armedo-Sasmiento*, 545 F.2d 785, 793-4 (2d Cir. 1976), *cert. denied*, — U.S. —, — (March 7, 1977). See *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Noah*, 475 F.2d 688, 695-96 (9th Cir.), *cert. denied*, 414 U.S. 1095 (1973); *United States* v. *Gray*, 464 F.2d 632, 637 (8th Cir. 1972). Viewed even in the light most favorable to Nemes, these remarks were, at worst, simply a reference to the absence of proof contradicting portions of the Government's case.

The prosecutor's observations about Nemes' conduct at counsel table (Tr. 1582) might better have been left unsaid but they surely were not in any way meant or understood as a reference to her failure to testify, nor were they prejudicial as Nemes now argues. This is simply not a case like *United States* v. *Alphonso-Perez*, 535 F.2d 1362, 1366 (2d Cir. 1976), where the prosecutor "implicitly calls for an inference from [the defendant's] failure to exercise that right [to testify];" indeed, even in the face of a prompt objection, this Court has noted that such a statement will not occasion reversal. Read in the context of the trial as a whole, this brief reference can hardly be described as anything but a minor transgression to which there was absolutely no objection. *United States* v. *Canniff*, *supra*. Indeed, defense counsel's total failure to object to any portion of the Government's summation demonstrates the weakness of this particular claim and Nemes' appellate attack on the summation as a whole, *United States* v. *Ong*, *supra*.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

## AFFIDAVIT OF MAILING

State of New York )
County of New York )

I, Lee S Richards , being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of March , 1977 he served ~~A~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Orans, Elsen & Polstein
One Rockefeller Plaza
New York, New York
10020

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lee S. Richards

Sworn to before me this

17th day of March, 1977

Jeanette Ann Graveb

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No. 24-[illegible]-75
Qualified in Kings County
Commission Expires March 30, 1977